Supreme Court, U.S.
FILED

961914 MAY 27 1997

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States
October Term, 1996

FRANK A. DELNERO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Frank A. Delnero
2955 Teakwood Street
Titusville, Florida 32780-5154
Phone 407/267-6119

FRANK A. DELNERO
Petitioner, pro se

QUESTIONS PRESENTED

I. Where does the Federal Rule of Civil Procedure 56 authorize the lower courts to negate the genuine issue(s) of material fact from a non-moving party's deposition and interrogatories when the moving party's affidavits for summary judgment provide a dispute in fact?

II. Where do the First and Fourteenth Amendents of the United States Constitution grant the lower courts power to deny a citizen *pro se* due process of law by ignoring his repeated requests for counsel?

LIST OF PARTIES

1. Appellante Counsel for the United States
   Linda Julin McNamara and Tamra Phipps
   Assistant United States Attorneys

2. Counsel for the United States in District Court
   Paul Byron and I. Randall Gold
   Assistant United States Attorneys

3. Delnero, Frank A.
   Petitioner, pro se

4. Department of Veteran Affairs
   Secretary Jessie Brown

5. Department of Justice
   Solicitor General of the United States

6. Eleventh Circuit Court of Appeals
   Anderson, Birch and Fay
   United States Appellante Circuit Judges

7. United States Attorney
   Charles R. Wilson

8. United States District Judge
   G. Kendall Sharp

TABLE OF CONTENTS

Page

Questions Presented..... i

List of Parties..... ii

Table of Contents..... iii

Table of Authorities..... iv, v

Index to Appendices..... vi, vii

Opinions Below..... 1

Statement of Jurisdiction..... 1

Constitutional and Statutory Provisions involved..... 1

Statement of the Case..... 2

Reasons for Granting the Writ..... 5

I. Addressing the first question..... 6

II. Addressing the second question..... 10

Conclusion..... 13

TABLE OF AUTHORITIES

Cases: Page

Adickes vs. Kress and Company
398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 (1970)..... 10

Anderson vs. Liberty Lobby Incorporated
477 US 242, 91 L Ed 2d 202, 106 S Ct 2505 (1986)... 6, 7, 12

Celotex Corporation vs. Catrett
477 US 317, 91 L Ed 2d 265, 106 S Ct 2548 (1986)..... 8

Crandall vs. Southwest Florida Blood Bank
581 So 2d 593 (2n DCA 1991)..... 9

Harris vs. Ostrout
65 F. 3d 912 (11th Cir. 1995)..... 11

Holl vs. Talcott
191 So 2d 40 (FL 1966)..... 8

Jameson vs. Arrow Company
75 F. 3d 1528 (11th Cir. 1996)..... 10

Kilgo vs. Ricks
983 F.2d 189 (11 Cir. 1993)..... 12

Matsushita Electric Industrial Co. vs. Zenith Radio
475 US 574, 89 L Ed 2d 538, 106 S Ct 1348 (1986)..... 10

Moore vs. Morris
475 So 2d 666 (FL 1985)..... 8

TABLE OF AUTHORITIES
(continued)

Statutes And Other Authorities: page

28 U.S.C. 1254 (1)..... 1

28 U.S.C. 1291..... 1

28 U.S.C. 1346..... 1

Federal Rule of Civil Procedure 56..... 1, 5, 6, 9

Federal Rule of Civil Procedure 56(c)..... 6, 7, 8, 10

Federal Rule of Civil Procedure 56(e)..... 7, 10

Federal Rule of Civil Procedure 56(f)..... 10, 12

Federal Torts Claims Act, 2671-2680..... 1

Local Rule 301 (g)..... 3

U.S. Constitution, Amendment I..... 1, 5, 10, 11, 13

U.S. Constitution, Amendment XIV,
Section I..... 1, 5, 10, 11, 12, 13

INDEX TO APPENDICES

page

Appendix--A --Decision of the U.S. Court of Appeals for the 11th Circuit dated February 25, 1997..... 1a

Appendix--B --Judgment of the U.S. Court of Appeals for the 11th Circuit dated October 22, 1996..... 3a

Appendix--C --Summary Judgment Order of the U.S. District Court, Middle District of Florida, Orlando Division dated September 25, 1995..... 5a

Appendix--D --Plaintiff Response to Defendant United States of America's Motion for Summary Judgment and Memorandum of Law in Support Thereof dated July 27, 1995..... 9a

Appendix--E --U.S. District Court's Milburn Order dated July 18, 1995..... 13 a

Appendix--F --The Federal Rules of Civil Procedure, Rule 56 (c), (e), (f) on Summary Judgment..... 15a

Appendix--G --A Unification of Early RSD Symptoms from the Plaintiff's Response to Defendant's United Statesof America's Motion for Summary Judgment andMemorandum of Law in Support Thereof, timely served on July 27,1995..... 17a

INDEX TO APPENDICES
(continued)

page

Appendix--H --Excerpts from the Plaintiff's Attending Physician's Deposition as presented in the "Brief of Appellant" to the 11th Circuit Court of Appeals timely served on April 24, 1996..... 19a

Appendix--I --Plaintiff's Motion to Extend Time for Acquiring Expert Witnesses dated June 30, 1995..... 25a

Appendix--J --Plaintiff's Response To: Defendant's Response to Plaintiff's Motion for Extension of Time for Acquiring Expert Witnesses and Motion to Strike Plaintiff's Notice of Expert Witnesses dated July 20, 1995..... 27a

Appendix--K --Expert Witnesses Statements hired by Appellee, United States of America, as presented in the "Brief of the Appellant" to the 11th Circuit Court of Appeals on April 24, 1996..... 32a

Appendix--L --Plaintiff's Memorandum of Response in Motion to Dismiss dated March 10, 1994..... 34a

Appendix--M --Complaint filed in the U.S. District Court for the Middle District of Florida, Orlando Division dated October 18, 1993..... 36a

Appendix--N --The U.S. Constitution's First Amendment and Fourteenth Amendment, Section 1..... 41a

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are reprinted in the Appendix at 1a and 3a. The opinion of the Orlando District Court is also in the Appendix at 5a.

JURISDICTION

The petitioner, pro se is not an attorney, yet, he believes this court has jurisdiction pursuant to 28 U.S.C. 1254 (1) in this case. The appeals court jurisdiction is 28 U.S.C. 1291 [decision filed February 25, 1997] and the district court's jurisdiction is 28 U.S.C. 1346(b) and 2671-2680 of the Federal Tort Claims Act. The petitioner also brings into his questions before this Court the United States Constitutional Amendments I and XIV.

CONSTITUTIONAL PROVISIONS AND THE FEDERAL RULE INVOLVED:

Federal Rule of Civil Procedure 56, Summary Judgment, and Amendments One and Fourteen, Section One, of the United States Constitution are applicable to the questions this case brings before this Court.

STATEMENT OF THE CASE

Petitioner, pro se, Frank A. Delnero, (Delnero) survived multiple fragmentation wounds in 1968 as a Marine in Vietnam. His wounds caused severe neurological damage, and manifested an incurable Reflex Sympathetic Dystrophy [RSD] condition due to lack of early diagnosis and immediate treatment.

In 1969 Delnero went for medical care to the Department of Veteran Affairs [VA] which time they began documenting classic symptoms of RSD continuing for a period of twenty-one years. The VA did not diagnosis Delnero's RSD until March 1990.

Government medical documents show the VA failed to provide effective treatment for Delnero even after the long delayed confirmatory diagnosis of his RSD. Further frustration caused by continued delays in effective treatment prompted the plaintiff to timely serve a Standard Form 95 with the district counsel at the VA in February 1992. In April 1993 the VA's General Counsel responded by denying accountability to Delnero's claim of medical negligence [Appendix M, Exhibit A, at 39a].

Delnero later filed suit against the respondent, United States of America (USA) on October 18, 1993 [Appendix M, at 36a]. He contended the VA should have diagnosed earlier and delivered a specific and effective treatment to arrest his

progressing RSD condition.

Early on with litigation Delnero realized time constraints, rule applications and problems with legal definitions necessitated court appointed counsel.

Delnero requested court appointed counsel for the second time on July 20, 1995, in the Plaintiff's Response To: Defendant's Response to Plaintiff's Motion For Extension Of Time For Acquiring Expert Witnesses And Motion To Strike Plaintiff's Notice Of Expert Witnesses [Appendix J, at 27a]. "...the plaintiff is not an attorney nor does he carry desires to be one. He relevantly requested that the court assign him legal counsel on March 10, 1994...This need became more apparent with the defendant's surfacing of Local Rule 301(g) some twenty-one months after the initiation of this case." The lower court ignored the plaintiff, pro se's repeated requests for appointed counsel in this legally complex case.

The lack of legal counsel caused Delnero to falter in maintaining court deadlines. He presented this limitation in his Motion To Extend Time For Acquiring Expert Witnesses, filed on July 3, 1995 [Appendix I, at 25a], and denied by the lower court on July 26, 1995.

Defendant United States Of America's Motion For Summary Judgment And Memorandum Of Law In Support Thereof [R1-34] was entered July 18, 1995, and this motion

was granted [Appendix C, at 5a] on September 25, 1995, one week from the scheduled trial date of October 2, 1995 [R1-20].

The Plaintiff's Response To Defendant United States Of America's Motion For Summary Judgment And Memorandum Of Law In Support Thereof [Appendix D, at 9a], was timely served with federal documents from his early medical examinations and the complete sworn deposition by his attending physician in opposition to the summary judgment motion.

Delnero provided the United States Court of Appeals for the Eleventh Circuit, in his Brief of Appellant properly served on April 24,1996, specific genuine issues of material fact from the Plaintiff's Answers to Interrogatories [R1-22] regarding the defendant's alleged medical negligence. Also in his argument were excerpts of a sworn deposition from his attending neurologist [R1-39-Ex. A]. His testimony created disputes of fact with the defendant's hired expert witnesses [Appendix H, at 19a. Also see Appendix G, at 17a].

The appeals panel, without stating an opinion, affirmed on October 22, 1996, the lower court's order of September 25, 1995, granting summary judgment for the defendant.

The Statement Of Issues That Merit En Banc Consideration were the following: 1) the plaintiff/appellant

presented a prima facie case with government documents suitable for trial; 2) subsequent legal problems arising from the lack of appointed counsel for the plaintiff created obstacles that were no fault of his own; 3) without mention to the sworn deposition of his attending physician was a numerous list of "genuine issues of material fact" that were recorded in the plaintiff's answers to interrogatories. It was reasonable for Delnero to also mention the appearance of impropriety by the district court.

The Appellant's Petition for Rehearing And Suggestion Of Rehearing En Banc, timely served on December 4, 1996, was denied on February 25, 1997, [Appendix A, at 1a].

This Petition for a Writ of Certiorari follows within the ninety-day rule allowed from the Appeal Court's denial.

REASONS FOR GRANTING THE WRIT

The District Court and Appeals Court both have made important decisions in *Delnero vs. United States of America* [*Delnero*] with Fed. R. Civ. P. 56 [Appendix F, at 15a] that conflicts with relevant decisions of the United States Supreme Court. Also, the lower courts failed to apply guarantees of the Amendments I and XIV of the U.S. Constitution in this case [Appendix N at 41a].

I. WHERE DOES THE FEDERAL RULE OF CIVIL PROCEDURE 56 AUTHORIZE THE LOWER COURTS TO NEGATE THE GENUINE ISSUE(S) OF FACT FROM A NON-MOVING PARTY'S DEPOSITION AND INTERROGATORIES WHEN THE MOVING PARTY'S AFFIDAVITS FOR SUMMARY JUDGMENT PROVIDE A DISPUTE IN FACT?

In the U.S. Supreme Court case *Anderson vs. Liberty Lobby Inc.* 91 L Ed 2d 202 (1986) at 206: "Under Rule 56(c) of the Federal Rules of Civil Procedure, the judge's function at summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. ...There is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it..." *Anderson* at 213.

In *Delnero* two experts hired by the United States, defendant/respondent, have rendered opinions that said this failure to diagnose and treat Delnero, plaintiff/petitioner's Reflex Sympathetic Dystrophy [RSD] was not medical negligence [Appendix K at 32a]. The petitioner's attending physician's opinion, however, is that the VA over a twenty-one year period, should have been aware of the RSD and diagnosed and treated it, since RSD has been a recognized

disease for over 130 years [Appendix H at 19a]. Therefore, in itself, this conflict of opinions creates a genuine issue of material fact requiring trial.

Furthermore, "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. ...Trial courts should act with caution in granting summary judgment..." *Anderson* at 207.

The similarity of summary judgment and directed verdict is stated in *Anderson* at 206, "The inquiries on a motion for summary judgment and on a motion for a directed verdict are essentially the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

The petitioner's lengthy list of medical neglect allegations, substantiated with government documents, is recorded in the plaintiff's interrogatories in the court record [R1-22]. This evidence is substantial even without the testimony of an expert witness. "Answers to interrogatories are included among the materials which may be considered on motion for summary judgment" Fed. R. Civ. P. 56(c).

The lower courts erred in *Delnero* with Fed. R. Civ. P. 56(e) when they failed to require the moving party "...to discharge his burden by showing--that is, pointing out to the District Court--that there is an absence of evidence to

support the non-moving party's case" *Celotex Corporation vs. Catrett*, 91 L Ed 2d 265, at 268.

The district court accepted the non-required use of affidavits by the moving party to substantiate its motion towards summary judgment. "Rule 56(c) does not require that the moving party support its motion with affidavits or other similar materials negating the opponent's claim..." *Celotex* at 268. This admission of the movant's affidavits does not disallow the essential evidence of the non-movant's attending physician's sworn deposition [R1-39-Ex. A] and the plaintiff's answers to interrogatories [R1-22] as the lower courts have apparently ruled to be so in *Delnero*.

Florida case law also supports these U.S. Supreme Court decisions: "Before it becomes necessary to determine legal sufficiency of affidavits or other evidence submitted by party moved against, it must first be determined that party moving for summary judgment has successfully met his burden of proving a negative, i.e., the nonexistence of genuine issue of material fact; he must prove this negative conclusively and the proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party" *Holl vs. Talcott*, 191 So 2d 40 (FL 1966) at 41. Also see, *Moore vs. Morris*, 475 So 2d 666 (FL 1985).

In *Delnero* the movant/respondent did not conclusively prove a negative of genuine issue of material fact

to overcome all reasonable inferences. The presentation of the movant's affidavits only creates a dispute in fact that further demands resolution by trial.

Rodney P. Dunaway, M.D., a United States employee and the petitioner's treating neurologist, could not agree to be an expert witness in this case. He does, however, deserve the right to opine that the VA failed to diagnosis the petitioner's RSD early on, therefore establishing the unlikelihood of a cure. His deposition is part of the record, and the non-movant, petitioner, is entitled to every favorable inference to defeat summary judgment as provided in Fed. R. Civ. P. 56.

Florida substantive law also provides that an opposing physician's opinion can create an issue of fact when it conflicts with the opinion of an expert witness employed by the moving party, therefore, defeating summary judgment. *Crandall vs. Southwest Florida Blood Bank,* 581 S0 2d 593 (2n DCA 1991) at 595.

The petitioner's attending physician's sworn testimony [see Appendices D, G & H] substantiated that the defendant/respondent should have diagnosed the RSD in 1969. His testimony along with the answers to interrogatories shed light most favorable to the non-movant/petitioner. "On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the

light most favorable to the party opposing the motion." *Matsushita Electric Industrial Co. vs. Zenith Radio,* 89 L Ed 2d 538, (1986) at 543 ; Also see, *Jameson vs. Arrow Co.*, 75 F.3d 1528 (11th Cir. 1996).

"The 1963 amendment to Rule 56(e)...is not intended to modify the burden of the moving party under Rule 56(c)...a party opposing summary judgment could successfully create a dispute as to a material fact asserted in an affidavit by the moving party simply be relying on a contrary allegation in a well-pleaded complaint." *Adickes v. Kress,* 26 L Ed 2d 142, (1970) at 145.

II. WHERE DO THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION GRANT THE LOWER COURTS POWER TO DENY A CITIZEN *PRO SE* DUE PROCESS OF LAW BY IGNORING HIS REPEATED REQUESTS FOR COUNSEL?

Delnero calls the attention of the U.S. Supreme Court's supervisory power on the lower courts in its questioning of whether Amendments I and XIV of the U.S. Constitution along with Fed. R. Civ. P. 56(f) adequately consider the due process of law for pro se litigants against an unresponsive court when repeated requests for counsel are ignored.

"In ruling on summary judgment motion, court construes pro se complaint more liberally than it would complaint of represented party" *Harris vs. Ostrout*, 65 F.3d 912 (11th Cir. 1995) at 913.

"...the right of the people...to petition the government for a redress of grievances." Amendment I, United States Constitution. A citizen who files a grievance against the government has a right to a fair and impartial judicial procedure to weigh its judgment. In *Delnero* the plaintiff/ appellant, pro se's legal restrictions were not justly addressed by the lower courts.

"...nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Section I. The legal complexity of *Delnero* certainly deserved and merited appointed counsel for the plaintiff.

The plaintiff's initial request to the district court for counsel was on March 10, 1994. "He (plaintiff)...had to acquire his own legal procedural knowledge during the filing process. If the court so permits it may assign the plaintiff legal representation" [Appendix L at 34a]. His second request was on July 20, 1995 [Appendix J at 27a]. Both attempts to attain counsel were ignored by the lower court.

The plaintiff, pro se's long struggle with the legal complexities both in definition of "medical expert", rule applications, and subsequent loss of time in pursuing the

court's demands was due to his lack of legal counsel. "The key is whether pro se litigant needs help in presenting essential merits of his or her position to court" *Kilgo vs. Ricks*, 983 F.2d 189 (11th Cir. 1993) at 193.

The plaintiff's other listed medical expert, Joseph Uricchio, Jr., M.D., refused to give his deposition without the plaintiff having adequate legal counsel [Appendix J at 2]. Shortly afterwards, the district court endorsed an order denying the plaintiff's motion to extend time to acquire an expert witness.

Fed. R. Civ. P. 56(f) states, "The court may refuse the application for judgment or may order a continuance to permit...depositions to be taken or discovery to be had or may make such other order as is just." The Supreme Court's interpretation of the rule is specific in *Anderson* at 213: "Rule 56(f)'s provision that summary judgment be refused where the non moving party has not had the opportunity to discover information that is essential to his opposition."

"No state shall make or enforce any law which shall abridge the privileges...deprive any person of life, liberty, or property, without due process of law." Amendment XIV, Section I, [Appendix N at 41a].

In summary, the plaintiff/appellant/petitioner in *Delnero* fought as a United States Marine and was severely wounded defending the policies of the United States and its

Constitution. If those laws state that even convicted felons receive appointed counsel then how can the lower courts deny those same privileges to the citizen who was wounded defending those rights? After five years of litigation in this case the petitioner contends he is still being denied the fair and impartial due process of law established in the United States Constitution.

III. CONCLUSION

The decisions of the district court and appeals court are in direct conflict with United States Supreme Court decisions in the aforementioned cases. The lower courts also failed to honor the guarantees of the First and Fourteenth Amendments of the United States Constitution in *Delnero.*

For the above reasons for the writ, and to secure and maintain uniformity of this court's decisions, the petitioner respectfully requests the United States Supreme Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

FRANK A. DELNERO
Petitioner, pro se
2955 Teakwood Street
Titusville, Florida 32780-5154
407/267-6119

APPENDIX--A: DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED FEBRUARY 25, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3693

FRANK A. DELNERO,
Plaintiff-Appellant

versus

UNITED STATES OF AMERICA, DEPARTMENT OF VETERAN AFFAIRS; USA,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION (S) FOR REHEARING AND
SUGGESTION (S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19___, ___F.2d___).

Before: ANDERSON and BIRCH, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing enbanc (Rule 35-5), the Suggestion (s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

___(illegible signature)
UNITED STATES CIRCUIT JUDGE

APPENDIX–B: JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 22, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3693
Non-Argument Calendar
D.C. Docket No. 93-900-CIV-ORL-18

FRANK A. DELNERO,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, DEPARTMENT OF VETERAN AFFAIRS; USA,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
October 22, 1996

Before ANDERSON and BIRCH, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The summary judgment entered in favor of the United States is affirmed for the reasons set forth in the Order of the district court dated September 25, 1995.

Affirmed.

FILED
U.S. Court of Appeals
Eleventh Circuit
OCT 22 1996
MIGUEL J. CORTEZ
CLERK

APPENDIX–C: SUMMARY JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, DATED SEPTEMBER 25, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-45]

FRANK A. DELNERO,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This case is before the court on Defendant United States of America's (USA's) motion for summary judgment (Doc. 34). Plaintiff Frank A. Delnero (Delnero) brought this action alleging that defendant USA, through its Department of Veterans Affairs, acted negligently in failing to diagnose and treat Delnero's medical condition as Reflex Sympathetic Dystrophy Syndrome (RSD) after Delnero sustained

multiple fragmentation wounds while serving as a United States Marine in Vietnam. Delnero contends that USA's agents or employees failed to recognize symptoms commonly associated with RSD from 1969 to 1990, and that this failure prevented Delnero from receiving treatment that might have cured his condition. USA argues that it is entitled to summary judgment because there remains no genuine issue of material fact.

Delnero's action essentially presents an issue of medical malpractice, and all of the activity complained of by Delnero occurred in Florida. The applicable Florida statute provides that in any action for recovery of damages for personal injury based on the negligence of a health care provider, the plaintiff must present evidence "that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care...shall be that level of care, skill, and treatment which...is recognized as acceptable and appropriate by reasonably prudent similar health care providers." Fla. Stat. ch. 766.102 (1) (1993). In order to prevail at trial, Delnero would have to present expert testimony as to what would be the level of care, skill and treatment expected of a reasonably prudent health care provider. However, Delnero has failed to present to the court the testimony of any witness classified as an expert in the

professional standard of care for the doctors who examined Delnero. The only witness in this case classified as an expert in this field, Dr. Robert R. Goodman, has stated that the doctors treating Delnero "did not deviate from the then prevailing standard of care within the relevant medical community." (Goodman Aff. ¶ 3.)

Federal Rule of Civil Procedure 56 (c) provides that summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits...show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has interpreted the rule to provide that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). In this context, "material" refers to the "substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id* at 248. While the court must view all evidence in the light most favorable to the non-moving party, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

When a party makes and supports a proper motion for summary judgment, as USA has done in this case, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). Delnero has failed to produce any admissible evidence that demonstrates that any of the doctors treating Delnero failed to adhere to the prevailing standard of care for reasonably prudent physicians at the time. This element is crucial to Delnero's case, and his failure to present any evidence to establish its existence requires the court to enter summary judgment against him. Therefore, the court **GRANTS** Defendant's motion for summary judgment (Doc. 34), and instructs the clerk of the court to enter judgment accordingly.

It is **SO ORDERED** in Orlando, Florida, this 25 day of September 1995.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

APPENDIX--D: PLAINTIFF'S RESPONSE TO DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF DATED JULY 27, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-39]

FRANK A. DELNERO
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

In pursuant to Rule 56, Federal Rules of Civil Procedure, the plaintiff presents pertinent case facts in dispute of the defendant's claim of entitlement to summary judgment in the above styled case. The genuine issue of material fact relevant to this action has been provided under oath in the form of a deposition along with other exhibits from government documents.

Rodney P. Dunaway, M.D., the plaintiff's Department of Veteran Affairs [VA] attending physician, did his residency training in neurology at Walter Reed General Hospital in Washington, D.C. from 1966 through 1969 where he treated casualties of the Vietnam War. The doctor's expert opinion on Reflex Sympathetic Dystrophy [RSD] as a result of gunshot wounds is disclosed to the Court from his deposition given on October 14, 1994. [Exhibit "A"]. His credentials are listed on pages three and four of that exhibit.

Question (page 6, line 18): Dr. Dunaway, do you think that the Department of Veteran Affairs should have been aware of RSD symptoms in 1969?

Answer (page 7, line 1): "The syndrome was a known syndrome as a result of nerve injuries. Certainly in 1969 they knew of the syndrome, and I would expect people to be aware of it and make a diagnosis."

Question (page 17, line 9): Having reviewed Mr. Delnero's medical record, is it true to state that there was no final diagnosis of RSD between October 1969 and March of 1990?

Answer (page 17, line 18): "To my knowledge, the diagnosis of reflex sympathetic dystrophy had not been considered until 1989."

Question (page 19, line 12): Thank You. Could you compare the treatment of RSD in 1969, with the treatment of

RSD today?

Answer (page 19, line 16): "I did treat RSD and causalgia in 1969 , so I do have personal knowledge of that."

Answer, continuing, (page 20, line 13): "The treatment was still based on interrupting the sympathetic pathways, and vigorous physical therapy and early diagnosis."

On October 7, 1969, the plaintiff was examined by a VA orthopedic physician who indicated the following symptoms of RSD in his report: (1) ankylosis of the knee and ankle, (2) brownish/grayish pigmentations of the ankle and foot, (3) hypoesthetic and hypalgesic to the lateral side of left leg including foot; and (4) osteoporosis of the patella and of all the visualized skeletal structures of the foot. [Exhibit "B"].

A U.S. Naval examination for the Physical Review Council on February 11, 1971, stated that the plaintiff was hospitalized for edema, pain and swelling of the left calf. These are all classic symptoms of RSD in there most severe form. [Exhibit "C"].

On April 12, 1973, the VA again failed to diagnose the plaintiff's RSD with a series of three specialized evaluations. They included another orthopedic examination along with neurological and psychiatric examinations. Additional RSD symptoms were noticed: (1) left foot sweats

a lot, (2) left thigh and lower leg atrophy, (3) advanced demineralization of the tibula and fibula, (4) irregular sleep pattern, and (5) a diagnosis of severe depressive neurosis. [Exhibit "D"].

The foregoing facts clearly establish that the VA did not provide the plaintiff, a combat disabled war veteran, with the appropriate standard of medical care available to the average American citizen. Only through the process of trial can the United States honorably defend itself from two decades of medical negligent allegations brought to justice by this case.

Wherefore, the plaintiff respectfully requests this Court in pursuant to Rule 56 of the Federal Rule of Civil Procedure to deny the defendant's motion for summary judgment.

/s/ Frank A. Delnero
Frank A. Delnero
Plaintiff, pro se

[Refer to Appendix G for a unification of the above RSD symptoms and Appendix H as excerpts from the deposition were presented to the 11th Circuit Court of Appeals]

[Please refer to the record (R1-39-4 to 47) for Exhibits A-D]

APPENDIX--E: U.S. DISTRICT COURT'S MILBURN ORDER DATED JULY 18, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-35]

FRANK A. DELNERO,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This action is before the court on a motion for summary judgment. The court notifies the parties that it will take the motion for summary judgment under advisement on July 31, 1995. *Milburn v. United States,* 734 F.2d 762, 765 (11th Cir. 1984); Fed. R. Civ. P. 56(c), (e). Until that date, the parties may file affidavits or other documents within the purview of Federal Rule of Civil Procedure 56 to

support or oppose the motion. An adverse party may not rely solely on the mere allegations or denials of the pleadings, but must set forth specific facts, by affidavits or other documents within the purview of Rule 56, showing that a genuine issue for trial exists; otherwise, the court shall enter summary judgment, if appropriate, against the adverse party. Fed. R. Civ. P. 56(e); *accord Griffith v. Wainwright*, 772 F 2d 822, 825 (11th Cir. 1985). This order applies to pro se litigants as well as parties represented by counsel. The court will not hold a hearing on the motion.

It is **SO ORDERED** in Orlando, Florida, this 18th day of July, 1995.

/s/ G. Kendall Sharp
G. KENDALL SHARP
United States District Judge

APPENDIX–F: THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 56 (c), (e), and (f) ON SUMMARY JUDGMENT:

RULE 56(C): Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RULE 56(E): Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all paper or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be

supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

RULE 56(F): When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

APPENDIX–G: A UNIFICATION OF EARLY RSD SYMPTOMS FROM THE PLAINTIFF'S RESPONSE TO DEFENDANT UNITED STATES OF AMERICA'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF, TIMELY SERVED JULY 27, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-39-Exhibits: B, C, & D]

FRANK A. DELNERO,
Plaintiff

vs.

UNITED STATES OF AMERICA
Defendant.

The plaintiff''s early symptoms of RSD, the dates they first appeared in federal medical documents and there location in the record:

a.) ankylosis, knee and ankle;

10/07/69, (R1-39-Ex:B-3).

b.) brownish/grayish pigmentations, ankle and foot;

10/07/69, (R1-39-Ex:B-3).

c.) hypoesthetic and hypalgesic, left leg and foot;

10/07/69, (R1-39-Ex:B-4).

d.) osteoporosis, left foot;

10/07/69, (R1-39-Ex:B-5).

e.) hospitalized edema, left calf;

02/11/71, (R1-39-Ex:C-1).

f.) hospitalized pain, left calf;

02/11/71, (R1-39-Ex:C-1).

g.) hospitalized swelling, left calf;

02/11/71, (R1-39-Ex:C-1).

h.) sweating, left foot;

04/12/73, (R1-39-Ex:D-1).

i.) atrophy, left thigh and lower leg;

04/12/73, (R1-39-Ex:D-2).

j.) advanced demineralization, tibia and fibula;

04/12/73, (R1-39-Ex:D-6).

k.) irregular sleep pattern;

04/12/73, (R1-39-Ex:D-5).

l.) severe depressive neurosis;

04/12/73, (R1-39-D-5).

[Also refer to Appendices--D and H]

APPENDIX–H: EXCERPTS FROM THE PLAINTIFF'S ATTENDING PHYSICIAN'S DEPOSITION AS PRESENTED IN THE BRIEF OF APPELLANT AT 6, TO THE ELEVENTH CIRCUIT COURT OF APPEALS TIMELY SERVED ON APRIL 24, 1996

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No. 95-3693
[Record location R1-39-Ex:A]

FRANK A. DELNERO
Plaintiff, Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Rodney P. Dunaway, MD, the plaintiff/appellant's attending VA neurologist, testified under oath in his deposition on October 14, 1994, as follows (R1-39-Ex:A):

(R1-39-Ex:A-27) RSD CAUSED BY WAR WOUNDS: "The question is whether the diagnosis or the treatment and diagnosis made of Mr. Delnero is a reflection of the wounds he received during the Vietnam War?"

"Yes sir, to my knowledge it is."

(R1-39-Ex:A-5) RSD AND THE WAR WOUNDED:

"Dr. Dunaway when you were assigned to Walter Reed Hospital, was the neurological staff making early diagnosis of RSD among the Vietnam War men in 1969?"

"Yes sir, we were seeing that fairly routinely."

(R1-39-Ex:A-6) NEGLIGENCE:

"Dr. Dunaway, do you think that the Department of Veteran Affairs should have been aware of RSD symptoms in 1969?"

"The syndrome was a known syndrome as a result of nerve injuries. Certainly in 1969 they knew of the syndrome, and I would expect people to be aware of it and make a diagnosis."

(R1-39-Ex:A-5) HISTORICALLY DOCUMENTED DISEASE:

"...what year was the term reflex sympathetic dystrophy used for the first time; can you recall?"

"It was described by Dr. Weir Mitchell in 1867..."

(R1-39-Ex:A-6) A ONE HUNDRED YEAR OLD DISEASE:

"What year was this?"

"1867 following the Civil War."

"So he apparently did work on wounded Americans?."

"He studied pain syndrome--""...it was first noted historically the nerve injuries due to gunshot wounds. "Yes."

(R1-39-Ex:A-7) PARAMOUNT TREATMENT FACTOR:

"Dr. Dunaway, do you agree that the paramount factor for successfully treating RSD relies on an early diagnosis?"

"Yes, sir."

(R1-39-Ex:A-19,20) TREATMENT STANDARD:

"Could you compare the treatment of RSD in 1969 with the treatment of RSD today?"

"I did treat RSD and causalgia in 1969, so I do have personal knowledge of that. In 1969, we treated causalgia and early reflex sympathetic dystrophy with sympathetic blocks and sympathectomy. ... We also treated them with fairly

vigorous physical therapy, and that was fairly standard for the neurology department at Walter Reed at that time. ... I personally did sympathetic blocks to patients on the ward. ... The treatment was still based on interrupting the sympathetic pathways, and vigorous physical therapy and early diagnosis."

(R1-39-Ex:A-17) DIAGNOSIS:

"Having reviewed Mr. Delnero's medical records, is it true to state that there was no final diagnosis of RSD between October 1969 and March of 1990?"

"To my knowledge, the diagnosis of reflex sympathetic dystrophy had not been considered until 1989."

(R1-39-Ex:A-10) SYMPTOMS:

"Well, in that exam there's osteoporosis in his left foot, all visualized skeletal structures, with no evidence of residual fracture from the x-rays, part of that particular examination...skin discoloration...Are these symptoms consistent with the symptoms of reflex sympathetic dystrophy?"

(R1-39-Ex:A-12) SYMPTOMS:

"Osteoporosis is fairly typical for the syndrome RSD...but it's one of the classic changes in this syndrome.

Changes in the skin, pigmentary changes...sweating... cutaneous changes described would be consistent with that."

(R1-39-Ex:A-14) SYMPTOMS:

"Is muscle atrophy and advanced demineralization symptoms of reflex sympathetic dystrophy?"

"Yes, sir."

(R1-39-Ex:A-15) PSYCHOLOGICAL:

"Is it true that RSD produces pain way out of proportion to what is physically apparent in most patients...and therefore producing the abnormal psychological behavior?"

(R1-39-Ex:A-16) PSYCHOLOGICAL:

"Secondary disorders, depression and other problems are fairly common felt mainly to be due to the pain."

"Continuing along with the psychiatric symptoms of patients with RSD, loss of concentration, social withdrawal, irritability. Are those also included in that area?"

"There's documentation in this syndrome and in many other chronic pain syndromes, yes, sir."

(R1-39-Ex:A-24) QUALITY OF LIFE:

"Is reducing stress a major part of eliminating flare-

ups of the pain of RSD?"

"Reflex Sympathetic Dystrophy pain seems to be worsened by emotion, stress."

(R1-39-Ex:A-8) QUALITY OF LIFE:

"Here's another three-part question. If Mr. Delnero was diagnosed and treated 25 years ago, would his quality of life be better during that period of his life...and also in the present and in the future?"

(R1-39-Ex:A-9) QUALITY OF LIFE:

"If Mr. Delnero did not have this chronic pain syndrome from the time of his injury, I feel there would be a difference in the quality of his life, yes, sir."

(R1-39-Ex:A-22,23) PROGNOSIS:

"Dr. Dunaway, being Mr. Delnero's attending neurologist, would you please state his prognosis due to the late diagnosis of RSD as of March 15, 1990?"

"The prognosis is very guarded in terms of, you know, complete recovery from the pain. It's been a long time. And the duration of the syndrome has a great deal to do with effectiveness of treatment, so it might be more difficult to get an effective treatment at this stage."

[Also refer to Appendices--D and G]

APPENDIX–I: PLAINTIFF'S MOTION TO EXTEND TIME FOR ACQUIRING EXPERT WITNESSES DATED JUNE 30, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-32]

FRANK A. DELNERO
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

The plaintiff was informed on June 7, 1995, by the defendant to the fact that since Dr. Dunaway was an employee of the Department of Veteran Affairs he could not be considered an expert witness in the above case.

The other expert witness, Dr. Uricchio, could not allow the plaintiff to take his deposition because the plaintiff is not represented by legal counsel. Dr. Uricchio's office notes are submitted for discovery, however, they are not in

the statement form of an expert witness.

Due to these foregoing circumstances the plaintiff is requesting the court grant him an extension of time to retain expert witnesses.

/s/ Frank A. Delnero
Frank A. Delnero
Plaintiff, pro se

APPENDIX–J: PLAINTIFF'S RESPONSE TO: DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME FOR ACQUIRING EXPERT WITNESSES AND MOTION TO STRIKE PLAINTIFF'S NOTICE OF EXPERT WITNESSES DATED JULY 20, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-36]

FRANK A. DELNERO
Plaintiff,

vs.

UNITED STATES OF AMERICA
Defendant.

The plaintiff courteously requests that the Court determine the level of truth to the defendant's following comments in the above styled case: (1) that the plaintiff handled the expert witness issue in bad faith, and (2) that the plaintiff was withholding information favorable to the United

States.

The plaintiff does admit guilt to wasting time in search of legal counsel in this case. He believes that the due process clause of the Fourteenth Amendment of the United States Constitution is applicable to his complaint against the government, as it would be to criminal cases against the people of the United States. Noted, the plaintiff is not an attorney nor does he carry desires to be one. He relevantly requested that the court assign him legal counsel on March 10, 1994. [Exhibit A]. This need became more apparent with the defendant's surfacing of Local Rule 301 (g) some twenty-one months after the initiation of this case. The plaintiff will pursue Local Rule 301 (g) at this time if it is so permitted by the court.

Does the plaintiff handle the expert witness issue in bad faith?

After receiving the defendant's disclosure of expert witnesses served on May 1, 1995, the plaintiff realized he, too, was required to notify the opposing party of expert witnesses. The plaintiff apologizes for his response to the defense for inappropriately reacting with the same notice wording as did the defendant. Nevertheless, having acquired through deposition the expert opinion of Dr. Dunaway, the treating physician but no less an expert, the plaintiff naturally listed Dr. Dunaway as an expert witness. He also

named Dr. Uricchio to the list. This document was served by mail on May 16, 1995. Dr. Uricchio does not allow any plaintiff, pro se, to take his deposition. [Exhibit "B"]. The plaintiff began correlating in detail the twenty-five years of case material into an understandable arrangement for Dr. Uricchio's review and opinion. It was finally submitted on June 21,1995. His response was on page six of the Uricchio Report dated June 27, 1995. [Exhibit "C"]. Please note that the defendant did not include page six of this report to the plaintiff when the United States designated it as Government Exhibit C.

Dr. Dunaway was known to the defendant as a witness in the Defendant's First Set Of Interrogatories to Plaintiff on September 16, 1994. [Exhibit "D"]. As noted in Exhibit "D" the plaintiff did not know the term definition of an expert witness nor can he recall formally asking Dr. Dunaway if he would specifically be an expert witness. Certainly his expert opinion was discussed because the plaintiff took Dr. Dunaway's deposition on October 14, 1994, for the purpose of being a witness in this case. [Exhibit "E"].

Does the plaintiff withhold information favorable to the defendant from October 25, 1994 to July 3, 1995?

Dr. Dunaway referred the plaintiff to Dr. Uricchio as a consulting physician on October 25,1994, at which time an

examination was done and a report sent to Dr. Dunaway at the Veteran Administration [VA] Outpatient Clinic. The defendant had access to this information because included in the Plaintiff's Response To Defendant's Request To Produce on September 1, 1994, was a signed Authorization To Furnish Medical Information by the plaintiff. [Exhibit "F"].

On March 8, 1995, during a neurological follow up visit with Dr. Dunaway it was noticed that the Uricchio Report was not found in the plaintiff's VA Medical Chart. The plaintiff left his copy of the report for Dr. Dunaway which its placement was noted in the plaintiff's chart [Exhibit "G"]. On March 24, 1995, the plaintiff requested from the VA Clinic all medical and administrative information from January 1994 to that present date. [Exhibit "H"]. When the information arrived approximately six weeks later the plaintiff noticed that the Uricchio Report was not made available to him then it probably would not be discovered by the defendant. The plaintiff sent the Uricchio Report to the defendant in his Response To Discovery Order listed separately from the VA medical chart information that was served on June 30, 1995. [Exhibit "I"].

Dr. Uricchio's June 27, 1995, reply fell far short of an expert witness report. Yet, his statement that early diagnosis and treatment is advisable for Reflex Sympathetic Dystrophy remains to be the foundation for which the plaintiff

substantiates his claim. The plaintiff's war wounds did create orthopedic injuries as stated by Dr. Uricchio, "I have reassured this patient that his treatment has been most appropriate over the years for what must have been a difficult and challenging orthopedic problem."

Does the above quote favor the defendant in this case?

May the plaintiff considerately remind the Court that this case is not about the recovery and sequential treatment to orthopedic injuries caused by war wounds. This case is about the defendant's failure to diagnose and treat the plaintiff's Reflex Sympathetic Dystrophy which is a neurological disease that involves the peripheral and central nervous systems.

WHEREFORE, the plaintiff respectfully requests that this court grant his motion for an extension of time to locate expert witnesses.

/s/ Frank A. Delnero
Frank A. Delnero
Plaintiff, pro se

[Please refer to the record (R1-36-5 to 16) for Exhibits A-I]

APPENDIX--K: EXPERT WITNESS STATEMENTS; HIRED BY APPELLEE UNITED STATES OF AMERICA, AS PRESENTED IN THE BRIEF OF THE APPELLANT AT 9, TO THE ELEVENTH CIRCUIT COURT OF APPEALS ON APRIL 24, 1996

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No. 95-3693

FRANK A. DELNERO,
Plaintiff, Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

The defendant/appellee's hired experts, Drs. Goodman and Rosner, testified by way of affidavit after reviewing portions [but not all] of plaintiff/appellant's medical records. Their *individual* statements are as follows:

"For the reasons set forth in my report, which is attached hereto and incorporated by reference as exhibit "B", it is my professional medical opinion, within a reasonable degree of medical probability, that the treatment provided to Mr. Delnero by the health care providers employed by the government did not deviate from the then prevailing standard of care within the relevant medical community." Dr. Robert R. Goodman (R1-38-1,2).

"For the reasons set forth in my report, which is attached hereto and incorporated by reference as exhibit "B", it is my professional medical opinion, within a reasonable degree of medical probability, that the treatment provided to Mr. Delnero by the health care providers employed by the government did not deviate from the then prevailing standard of care within the relevant medical community." Dr. Howard L. Rosner (R1-42-1,2).

The defendant's expert, Dr. Goodman, noted in his report that his opinion was based upon incomplete records (R1-34-Ex:B-1). Nothing in the record indicates that the medical records furnished to Dr. Rosner were any more complete than those furnished to Dr. Goodman.

APPENDIX–L: PLAINTIFF'S MEMORANDUM OF RESPONSE IN MOTION TO DISMISS DATED MARCH 10, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-8]
FRANK A. DELNERO
Plaintiff,
vs.
UNITED STATES OF AMERICA
DEPARTMENT OF VETERAN AFFAIRS,
Defendant.

The plaintiff responds with the credence that no party will be prejudiced by the court's acceptance to grant an extension of time for proper service for this cause in pursuant to Fed. R. Civ. P. 4 (j).

The plaintiff pro se entered his complaint on October 18, 1993 with the clerk of this court at which time he learned that the U.S. Attorney's Office required service of the complaint. The above office informed him of the procedure to render this service. The plaintiff was not made aware of the fact that the U.S. Attorney General, Washington, D.C., also

required service until February 28, 1994 date of the Defendant's Motion and Memorandum to Dismiss. May the court realize the circumstances in the plaintiff's individual case that he did apply full knowledge to satisfy proper service from a good faith gathering of information.

On March 4, 1994 the U.S. Attorney General and the Department of Veteran Affairs both in Washington, D.C. were served in this cause in pursuant to Fed. R. Civ. P. 4 (d) (4). See Exhibit A and Exhibit B. He had been abandoned by legal counsel and therefore had to acquire his own legal procedural knowledge during the filing process. If the court so permits it may assign the plaintiff legal representation.

The defense refers to grounds for dismissal with Cooper, 971 F.2d. 640 (11th Cir. 1992). Cooper is uncompliant with this plaintiff's context of action to properly serve his complaint. In Cooper the court found that the plaintiffs had shown a "repeated disregard for timely prosecution of (their) claims."

Based on the foregoing show of good cause and in order for justice to be served, the Defendant's motion for dismissal must be denied.

/s/ Frank A. Delnero
Frank A. Delnero
Plaintiff, pro se

[Please refer to the record (R1-8-3 to 6) for Exhibits A & B]

APPENDIX–M: COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, DATED OCTOBER 18, 1993

IN THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF FLORIDA
ORLANDO DIVISION
Case No. 93-900-CIV-ORL-18
[Record location R1-1]

FRANK A. DELNERO
vs.
UNITED STATES OF AMERICA
DEPARTMENT OF VETERAN AFFAIRS.

COMPLAINT

Plaintiff Frank A. Delnero pro se sues the United States of America Department of Veteran Affairs and States:

1. This action for damages brought pursuant to 28 U.S. Code 1346 (b) and 2671-2680 of the Federal Torts Claims Act.

2. Final agency action in this matter was April 30,

1993. See attached exhibit A.

3. The nature of this claim is a claim for medical negligence by the defendant resulting in failure to diagnose and treat a service connected medical condition known as Reflex Sympathetic Dystrophy Syndrome (RSD). The plaintiff's RSD is a disabling painful disease originating from multiple fragmentation wounds that he sustained as a Marine in Vietnam.

4. The allegations of wrongdoing and negligence are as follows:

a.) The defendant's early failure to recognize classic symptoms of the plaintiff's RSD from detailed medical examinations in October 1969, April 1973 and February 1977. These failures prevented the plaintiff from receiving early treatment which would most likely have cured or at least ameliorated his RSD.

b.) The defendant's incessant failure to diagnose the plaintiff's RSD until March 15,1990, was below the appropriate standard of medical care. After two decades of medical negligence the plaintiff's RSD has spread from the initial injured area of the left lower leg the left thigh, left buttock, groin and lower back. At this time the plaintiff's prognosis is very poor. It is very likely his RSD will link to his central nervous system and invade other areas of his body.

c.) The refusal to authorize and/or reimburse to the plaintiff payment for testing and treatment, not provided by the defendant, that is essential to a standard level of medical care for relief from RSD.

d.) The defendant's use of administrative abuse (avoiding entitlements with bureaucratic redundancies) in lieu of competent and efficient medical care has caused additional physical and/or psychological hardship to the plaintiff and his family.

5. As a direct an proximate cause of the foregoing the plaintiff has suffered damages including pain, suffering, aggravation of a preexisting condition, disability injuries and other damage.

Wherefore, plaintiff asks this court to:

a.) Take jurisdiction over this cause,

b.) Grant plaintiff a trial by jury if so permitted,

c.) Enter judgment for damages in favor of plaintiff and against defendant,

d.) Award costs of this action to plaintiff.

/s/ Frank A. Delnero

Frank A. Delnero
2955 Teakwood Street
Titusville, Florida
32780-5154
October 18, 1993

EXHIBIT-A

DEPARTMENT OF VETERAN AFFAIRS
Office of the General Counsel
Washington DC 20420

APR 30 1993 In Reply Refer to:
CERTIFIED MAIL 021:MTB

Ms. Linda L. Schwichtenberg
Attorney at Law
Law Offices of Nolan Carter, P,A.
200 East Robinson Street, Suite 1245
P.O. Box 2229
Orlando, Florida 32802

Subject: Administrative Tort Claim
Request for Reconsideration
Frank A. and Pamela W. Delnero

Dear Ms. Schwichtenberg:

We have now completed our reconsideration of your clients' claim, and we hereby advise you that the claim is again denied.

Our review revealed no evidence of a negligent or wrongful act on the part of an employee of the Department of Veterans Affairs (VA) acting within the scope of his or her

employment allegedly causing your clients' personal injury.

If your clients are dissatisfied with the action taken on their claim, you may, in accordance with the Federal Tort Claims Act, sections 1346 (b) and 2671-2680, title 28, United States Code, file suit in an appropriate Federal district court no later than 6 months after the date of this letter. If you decide to initiate such a suit, you are further advised that the proper party defendant would be the United States, not VA.

Sincerely yours,

James P. Kane /s/
James P. Kane
Assistant General Counsel

APPENDIX–N: THE UNITED STATES CONSTITUTION'S FIRST AMENDMENT AND FOURTEENTH AMENDMENT, SECTION ONE:

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV

SECTION 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.